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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,	)	No. CR 16-00440 WHA
	)	
Plaintiff,	)	<b>UNITED STATES' MOTION IN LIMINE NO.</b>
	)	<b>TWO TO EXCLUDE EXPERT TESTIMONY OF</b>
v.	)	<b>TAMI LOEHRS.</b>
	)	
YEVGENIY ALEXANDROVICH NIKULIN,	)	Trial: March 9, 2020
	)	Pretrial Conference: February 19, 2020
Defendant.	)	Time: 1:30 p.m.
	)	Courtroom No. 12
	)	

**I. INTRODUCTION**

Defendant Yevgeniy Nikulin is charged in an Indictment with three counts of computer intrusion, in violation of 18 U.S.C. § 1030(a)(2)(C); two counts of intentional transmission of information, code, or command causing damage to a protected computer, in violation of 18 U.S.C. § 1030(a)(5)(A); two counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1); one count of trafficking in unauthorized access devices, in violation of 18 U.S.C. § 1029(a)(2); and one count of conspiracy, in violation of 18 U.S.C. § 371. Defendant has provided a summary notice that he may introduce expert testimony by a computer forensic examiner. Because the notice provided does not

1 contain any information on the expert's opinions or bases for those opinions, the Court should exclude  
2 the proposed testimony.

## 3 **II. BACKGROUND**

4 On January 15, 2020, defendant filed a Notice of Expert Testimony of Digital Forensics Expert  
5 Tami Loehrs. ECF No. 133. The notice includes general information about Ms. Loehrs background as a  
6 forensics examiner. It does not include any information on her anticipated testimony, opinions, bases for  
7 those opinions, the materials she examined, or any other substantive topic relevant to this case. The  
8 notice further states that "the defense is not yet in receipt of Ms. Loehrs opinion" but will provide it  
9 when it has received the opinion and determines it is helpful to the defense.

## 10 **III. ARGUMENT**

11 Pursuant to Federal Rule of Evidence 702, an expert may testify "[i]f scientific, technical, or  
12 other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in  
13 issue." District courts perform a gatekeeping role to prevent unreliable expert testimony. *See Daubert v.*  
14 *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). The decision as to whether to admit or exclude an  
15 expert is an individualized inquiry and district courts "must strike the appropriate balance between  
16 admitting reliable, helpful expert testimony and excluding misleading or confusing testimony..."  
17 *United States v. Cordoba*, 104 F.3d 225, 228 (9th Cir. 1997) *quoting United States v. Rincon*, 28 F.3d  
18 921, 926 (9th Cir. 1994). Expert testimony, like all evidence, must also be relevant as defined in Federal  
19 Rules of Evidence 401 and 402. The disclosure provided by defendant does not enable the Court or the  
20 United States to evaluate the admissibility of Ms. Loehrs expert testimony pursuant to Rule 702.  
21 Without information regarding her anticipated opinions, there is no way to determine whether the  
22 testimony would be relevant, reliable, or helpful. For that reason, the Court should exclude the  
23 testimony.

24 Moreover, Federal Rule of Criminal Procedure 16(b)(1)(C) requires a defendant, at the  
25 government's request, to give a summary of any proposed testimony under Fed. R. Evid. 702. The  
26 government has made such a request, and has complied with Fed. R. Crim. P. 16(a)(1)(G) with its own  
27 expert notices. Moreover, the Court, with the parties' agreement, has ordered both parties to disclose  
28 expert testimony prior to trial. ECF Nos. 118, 121. The defendant's notice does not provide the United

1 States the witness's opinions, or the bases and reasons for those opinions, as required by Rule  
2 16(b)(1)(C). Absent a summary of the expert testimony by which the United States can evaluate its  
3 relevance, helpfulness, and reliability, the Court should exclude Ms. Loehrs' testimony. Should the  
4 defense provide such a summary, the United States may move to exclude the proposed testimony on  
5 more specific grounds.

6 **IV. CONCLUSION**

7 The United States therefore moves *in limine* for an order excluding expert testimony by Tami  
8 Loehrs.

9 DATED: January 22, 2020

Respectfully submitted,

10 DAVID L. ANDERSON  
11 United States Attorney

12 /s/  
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14 KATHERINE L. WAWRZYNIAK  
15 Assistant United States Attorneys  
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